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ABORIGINAL LAND RIGHTS IN CANADA: A HISTORICAL PERSPECTIVE ON THE FIDUCIARY RELATIONSHIP

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Introduction

Individual aboriginal communities are unique in many ways and, while wholly divergent in terms of specific histories, nevertheless they share common values and needs. Due to political impotence, societal differences, lack of acculturation, and lack of wealth, the aboriginal community has come to rely on the federal government.[1] Specifically, Indians depend on the federal government to manage resources and funds and broker their relationships with entities of the dominant society, such as states and municipal governments.

Aboriginals maintain an extremely close spiritual connection to the land, since it is the land that forms the basis for cultural distinctiveness and specific status.[2] Land is almost always a focal point for tribal sovereignty, because in most countries whatever power tribes have can only be exercised over their own land.[3] Protection of the land base is a major issue among aboriginal peoples today since without land they have no resources and no ability to practice their subsistence economies, much less develop a modern economy. Therefore, much of aboriginal law revolves around the dispute and resolution of land claims.

The European nations claimed that discovery of a land inhabited by aboriginal peoples vested title in the discovering nations, with rights of use and occupancy held by the Indians. Exclusion of all other nations gives the discovering nation the absolute right to acquire land from the natives.[4] This concept

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1. Henderson, *Litigating Native Claims*, 19 LAW SOC. GAZZETTE 177, 177 (1984).

2. Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319 (1988).

3. Newton, *Enforcing the Federal Trust Relationship After* Mitchell, 31 CATH. U.L. REV. 635, 638 (1982) [hereinafter *Trust Relationship*].

4. Erickson, *Aboriginal Land Rights in the United States and Canada*, 60 N.D.L. REV. 107, 109 (1984).

protected Indian land rights as well as the principle of federal exclusivity in dealing with Indians. The seizure of power gave rise to the argument that title to aboriginal land creates a type of fiduciary relationship obligating the government to undertake the care of the Indians. In Canada, the provisions of the doctrine of discovery were incorporated into the Royal Proclamation of 1763; in the United States, the doctrine is frequently referred to and relied upon in court opinions.[5]

The executive, the legislatures, and the judiciaries of modern nations have struggled to mark the boundaries and assess the legal consequences of this unique relationship between the sovereign and the aboriginal community. Nevertheless, the international law community has never directly addressed the rights of aboriginal or native peoples, because aboriginal communities are not regarded as sovereign states in either international law or international forums.[6] Rather, there is a pervasive tendency to deny the existence of aboriginal rights and, to an extent, the existence of aboriginals themselves. What emerges is a reliance on a composite of rules and principles and to some degree, traditions to react to the specific needs of the aboriginal community.

This note examines the fiduciary relationship between the aboriginal community and the sovereign in Canada. The note will begin with a brief discussion of aboriginal rights in general. Because of historical and legislative developments, and the similarity in dealing with native peoples, United States Indian law is an obvious backdrop against which to consider Canadian policy. In addition, Canadian courts frequently cite, though do not always follow, United States case law. For this reason, a brief summary of the treatment of aboriginal rights by the United States courts is included. This note will then present an analysis of the social, legislative, and judicial history of the fiduciary relationship in Canada.

Aboriginal Rights in General

By definition, aboriginal land title is a nontreaty possessory form of property right inuring to native peoples by virtue of continuous occupation since time immemorial.[7] Under this doc-

5. *Id.* at 112.

6. Slattery, *The Hidden Constitution: Aboriginal Rights in Canada*, 32 AM. J. COMP. L. 361, 373 (1984).

7. Sanders, *The Rights of Aboriginal Peoples in Canada*, 61 CANADIAN BAR REV. 314, 315 (1983).

trine, title vests in the sovereign with the right of use and occupancy established in the band or tribe.[8] Neither legislative fiat nor governmental grace creates these rights. Rather, they are preexisting rights solely retained by the incident of the original and continuous possession.[9]

A principal characterization of aboriginal land is limited alienability. These lands are alienable solely to the sovereign.[10] In Canada, surrender to the government is required prior to alienation so as to interpose the Crown between the Indians and prospective purchasers or lessees in order to protect against exploitation of the Indians.[11] The surrender concept is not as clearly articulated in United States Indian law but is present, nevertheless.

In addition to limited alienability, aboriginal land title is susceptible to extinguishment by the sovereign without compensation or even explanation. These provisions afford a mechanism for retention of control over the land (and over the aboriginals themselves) while segregating the rights of ownership and occupancy. According to the rule first articulated in *Tee-Hit Ton v. United States*[12] and followed in Canada by *St. Catherine's Milling*,[13] the property interheld by the Indians is merely possessory, subject to the overriding interest of the federal government and not requiring compensation for extinguishment. It is the segregation of ownership and occupation rights which necessarily gives rise to the fiduciary relationship between the sovereign and the aboriginal peoples. In other words, the courts have reasoned that since the land is only alienable to the sovereign and subject to arbitrary termination, the power of the sovereign embodies the responsibility to act in the best interest of the Indians.

The attributes of inalienability and discretionary termination flow logically from the doctrine of discovery,[14] which is enthusiastically embraced by both the United States and Canada and which has enormous impact on the concept of aboriginal title. The doctrine of discovery means that the interest of the Indians is merely one of occupancy arising out of possession, with the result being that the discovering nation unilaterally gained an

8. *Id.* at 323.
9. *Id.*
10. Erickson, *supra* note 4, at 121.
11. *Id.*
12. 348 U.S. 272 (1955).
13. 13 S.C.R. 557 (1887), 144 App. D.C. 46 (1888).
14. Erickson, *supra* note 4, at 127.

absolute title to the land. As previously stated, the separation of rights gives rise to the fiduciary relationship. The courts in both Canada and the United States are engaged in a process of defining the parameters of this relationship and the duties it implies.

In order to understand the current developments regarding this relationship, and assess the possible future direction it may take, the historical background of both countries will be examined.

Aboriginal Land Title in the United States

As previously stated, the international law community provides little direction for governments to follow in dealing with aboriginal peoples. Although both Congress and the executive branch acknowledge the concept of a fiduciary relationship, the concept evolved judicially.[15] In attempting to determine the boundaries of the relationship, courts fluctuate between establishing broad and narrow views of the duties involved. The broader view regards the trust relationship as a moral obligation. Essentially, this view puts the sovereign in a paternalistic role under which the Indians, as charges, have legitimate expectancies and desires which will be fulfilled by the "great white father." The narrower view, in contrast, imposes a strict trustee-beneficiary duty. The sovereign has an obligation similar to the fiduciary obligation a bank has in the administration of an estate. Unfortunately, ascertaining which view a particular court espouses is often difficult. Therefore, it is necessary to examine the language of the court's holding and, to the extent possible, the societal trends underlying the court's policy decisions. Opinions in which a court imposes obligations on the trustee-government usually espouse the narrower view; cases upholding governmental power or dealing with third party rights often espouse the broader view.

The judicial history of aboriginal rights in the United States reflects the nation's attitudes as a whole. With few exceptions, history illustrates that the judiciary has been hesitant in making decisions regarding the relationship between the government and the aboriginal peoples. Although early case law contains some impressive statements regarding aboriginal rights and governmental obligations, that same case law also reflects a degree of suspicion and paternalism directed toward the aboriginal com-

15. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1213-48 (1975).

munity. Only recently have courts addressed the extent to which Indian tribes can enforce fiduciary duties against the government. Consequently, aboriginal land rights and governmental obligations remain unsettled in American law.

The First Case in the Marshall Trilogy: Johnson v. M'Intosh

The first major American statement dealing with aboriginal title is the 1823 case of *Johnson v. M'Intosh*.[16] This case is the starting point for any inquiry into the area of land titles in the domestic as well as the international sphere. *Johnson* questioned the ability of the Illinois and Piankeshaw nations to grant land to private individuals. In 1773, the Illinois and Piankeshaw nations granted land to a private individual. In 1775, the same tribes granted the same land to the United States. The ultimate issue was which grant was legally valid. Writing for the Court, Chief Justice John Marshall concluded that the original sale by the Indians conveyed at most only the same right of occupancy that the tribe possessed. Therefore, the original sale was legally insignificant since the sovereign alone could extinguish title. The later sale to the federal government was thus the valid grant.

Johnson presents the first judicial justification for the doctrine of discovery.[17] According to Justice Marshall, the British government asserted an absolute title to all lands occupied by the Indians; title being vested in the United States as sovereign successor to King George III and the United States succeeded to Britain's claims.[18] In a narrow holding, the Court acknowledged the fiduciary relationship. Justice Marshall concluded that the sovereign holds absolute legal title to the land, but the Indians have a "legal as well as a just claim to the land."[19] The Indians hold a legal right to their lands but the Court stressed this right was valid against all except the sovereign.

The Second Case in the Marshall Trilogy: Cherokee Nation v. Georgia

In *Cherokee Nation v. Georgia*,[20] the Supreme Court assessed the legal status of Indian tribes in the United States. The Court held that Indian tribes are not the equivalent of foreign states

16. 21 U.S. (8 Wheat.) 543 (1823).
17. Chambers, *supra* note 15.
18. Erickson, *supra* note 4, at 109.
19. *Johnson*, 21 U.S. (8 Wheat.) at 574.
20. 30 U.S. (5 Pet.) 1 (1831).

but rather "dependent domestic nations."[21] The holding emphasized that the United States asserts title independent of Indian consent and that various tribes look to the federal government for protection. According to the Court, the Indians have the right to occupy and use their land subject to the overriding interest of the federal government. The relationship is akin to that of ward and guardian; the Indians are "in a state of pupilage"[22] requiring the guidance and wisdom of the federal government. In effect, the Court imposes moral and social obligations on the sovereign. The language regarding the federal-tribal relationship, especially the analogy to a guardian-ward situation, indicates a broad view of the fiduciary relationship.

The Third Case in the Marshall Trilogy: Worcester v. Georgia

The third case in the Marshall trilogy, regarded as the foundation of Indian law, is *Worcester v. Georgia*.[23] *Worcester* focused on the role of the state in conjunction with the power of the sovereign regarding Indian tribes. In *Worcester*, a white missionary entered the Cherokee reservation without obtaining a license, in violation of a state statute. After a state court conviction, the missionary challenged the state statute. The determinative factor in the case was that the federal Constitution granted exclusive control over Indian affairs to the federal government. The Court determined that the state statute was repugnant to the supremacy clause of the Constitution and further, that certain rights held by Indians were immune from interference by the state. According to the Court, Indians comprise "distinct political communities"[24] able to exercise exclusive authority in their own affairs within the boundaries of the reservation.

Worcester illustrates the confusion of standards and erratic results reached by the judiciary in attempting to define the parameters and legal consequences of sovereign control over Indian land. In dicta, the Court stated that it was difficult to reconcile the doctrine of discovery, which gives the discovering nation rights in the newly discovered territory and the preexisting rights of the aboriginal peoples.[25] *Worcester* indicates that the

21. *Id.* at 17.
22. *Id.*
23. 31 U.S. (6 Pet.) 515 (1832).
24. *Id.* at 561.
25. Erickson, *supra* note 4, at 112.

United States has great power over the ownership of Indian land, with the only limitation being that the sovereign cannot extinguish Indian title without compensation, unless extinguishment is a result of war. That is, conquering is a legitimate means of extinguishment.[26] In *Worcester*, the Court adopted a narrow view of the fiduciary relationship. The Court departed from the existing case law when it viewed the primary method of land acquisition as purchase.

The Marshall trilogy set the stage for the inception of the plenary power era. With the end of treaty making by Congressional fiat in 1871 came statutes designed to implement the new policies embraced by the government, including allotment and assimilation.[27] The Court was forced to develop new rationales for the justification of federal actions regarding Indians. The overall goal was to obtain cessions of land and ensure peaceful relations with the Indians. From these two concepts—property interest and guardianship—the plenary power doctrine[28] allowed the federal government unrestrained power over the Indians.

The Plenary Power Era

During the plenary power era, federal policymakers denied tribal Indians the basic freedoms accorded other American citizens based on the theory that their relationship to the United States was "an anomalous one and of a complex character."[29] Indian-imposed restraints on alienation, liquor sale and use regulations, and contract rights affecting trust property were made conditional upon approval by the Secretary of the Interior.[30] Congressional power over Indians seemed immune from judicial interference. In fact, no Supreme Court has ever invalidated an act of Congress as being beyond the scope of federal power over Indian affairs.[31] The Court established a practice of upholding the plenary power because of the Indians' "condition of dependency," which somehow subjected Indian property to the administrative control of the federal government.[32] This authority permitted Congress, acting through the Secretary of the Interior, to lease, sell or allot any tribal land without the

26. Sanders, *supra* note 7, at 318.

27. Newton, *Federal Power Over Indians: Its Sources, Scopes and Limitations*, 132 U. PA. L. REV. 194, 199 (1984) [hereinafter *Federal Power*].

28. *Id.*

29. United States v. Kagama, 118 U.S. 375, 381 (1886).

30. *Federal Power*, *supra* note 27, at 209.

31. Chambers, *supra* note 15, at 1213.

32. Stephens v. Cherokee Nation, 174 U.S. 445, 488 (1899).

consent of the tribe, even in violation of treaty promises.

While the plenary power doctrine was useful in settling claims, judicial misinterpretation resulted in virtually unreviewable federal power over Indian lands. Case law indicates a progression from viewing the government's interest as a preemptive right to purchase tribal land to a title interest, resulting in mere possession rights in the tribe. Viewed this way, it is possible to regard ownership of land alone as giving the government the power to govern Indians.

One of the most unexpected and damaging misinterpretations of the plenary power doctrine is found in the case of *Tee-Hit-Ton Indians v. United States*.[33] This case presented the issue of whether aboriginal ownership conferred any legal or equitable rights against the government. Relying on questionable legal precedent, Justice Reed concluded that Indian title rights were merely possessory: they did not represent a property interest which required compensation when extinguished. The Court held that absent Congressional recognizance of an Indian right to live on the land by treaty or other specific legislation, no compensable property right existed.[34] The Court reasoned that discovery extinguished all Indian title; therefore, aboriginal title represented permissible occupation given by the sovereign, not ownership.

Following the Marshall Court era came wide judicial reaffirmance of the basic tenets of the plenary power doctrine. None of the decisions seem to support the holding of *Tee-Hit-Ton*.[35] The harsh language of the opinion may reflect fiscal considerations of huge damage awards rather than sound policy.[36] The decision requires reevaluation; it is an aberration that continues to threaten the rights of Native Americans.

Gradually, the policy began to shift in favor of protection of tribal cultures and encouragement of tribal self government. Toward this end, the Court became increasingly receptive to Indian claims. In effect, the judiciary began to acknowledge the special nature of the relationship between the government and the aboriginal community.

Development of the Enforceable Trust

Since the federal government holds most Indian land in trust, courts are fairly receptive to governmental regulation of Indian

33. 348 U.S. 272 (1955).

34. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1216 (1980).

35. *Id.* at 1226.

36. *Id.*

affairs in terms of land management.[37] In turn, tribes consistently seek to establish an enforceable trust relationship where the federal exercise of power gives rise to correlative responsibilities. As more Indian claims reached the judiciary, the Court began to narrow and redefine the plenary power doctrine. Gradually, the Court began to impose duties on the government to responsibly manage Indian land and resources. But the plenary power doctrine was not expunged. The breach of trust cases do not challenge the authority of the government to manage and control property. Instead, they argue that such power imposes duties, the breach of which are remediable.

Many of the early cases regarding mismanagement of trust property contain appealing fact patterns. Due to its expansiveness, tribal land is of significant economic value. Moreover, the Indians' spiritual affinity with the land is often in direct conflict with the government's expansion and profit motives. Several of the early cases are a result of the termination legislation prevalent in the 1950s which attempted to terminate the special relationship between certain tribes and the government.[38] In short, this legislation forced assimilation, granted states jurisdiction (including taxing power), ended Indian entitlement to federal programs and provided for the sale of Indian property with provisions for division of profits among tribal members.[39] Many claims arose from these provisions resulting in increasingly expansive duties imposed on the government and the granting of equitable relief to the Indians.

In *Navajo Tribe v. United States*,[40] the government was held liable for the assignment of a lease it had supervised for the tribe for nominal consideration when the assignor had announced its intention to surrender the lease to the tribe. The court likened the situation to a "fiduciary who learns of an opportunity, prevents the beneficiary from getting it and seizes it for himself."[41] Taking a broad view of both the source and the scope of the government's duties, the court reasoned that the case was analogous to private trust law and imposed on the government a "special duty of care regarding the property."[42]

In *Pyramid Lake Paiute Tribe v. Morton*,[43] the Court held that the Secretary of the Interior violated his duty to the tribe

37. Sanders, *supra* note 7, at 319.
38. Chambers, *supra* note 15, at 1216.
39. *Federal Power*, *supra* note 27, at 209.
40. 624 F.2d 981 (1980).
41. *Id.*, 624 F.2d at 987.
42. *Id.* at 988.
43. 499 F.2d 1095, *cert. denied*, 420 U.S. 962 (1975).

to keep the lake full in order to protect the Bureau of Reclamation's interest in diverting water as part of an irrigation project. The Secretary of the Interior made a "judgment call" in assessing and balancing the respective needs of the parties. The Court determined such arbitrariness to be inappropriate and miscalculated.[44]

The significant aspect of *Morton* is that the duty was not found in a statute or treaty provision. The court relied on case law to impose a duty of loyalty on the Secretary of the Interior. The holding seems to require the subordination of non-Indian federal activity to Indian property interests in the event of conflict.

The *Navajo Tribe* and *Morton* courts construe statutes liberally in order to establish a trust relationship. The fiduciary duties of the government are analogized to private trust law to afford a remedy for the Indians. The following case, *United States v. Mitchell*,[45] does not adhere to the liberal construction of *Navajo Tribe* and *Morton*.

As part of the termination legislation, the Allotment Act was passed whereby allotments of land were made to Indian tribes subject to the approval of the Secretary of the Interior. The policy was an administrative disaster and many claims resulted. In *United States v. Mitchell [Mitchell I]*, the Quinault Indians received an allotment of land so dense with timber it could only be used for forestry, a practical impossibility given the limited acreage allotted. In addition, even if the tribe organized and entered the timber industry, they could not sell the timber without the federal government's consent. Beginning in 1910, Congress authorized the Bureau of Indian Affairs to contract for the sale of timber on allotted land and to manage the business of harvesting, selling and replanting the timber.[46] The Quinaults alleged mismanagement of resources and the trust fund derived from those resources. Specifically, the Quinaults alleged that the government failed to obtain fair market value for the timber and for rights of way granted across Indian land, and failed to invest the trust fund money.

A breach of trust suit was filed in 1971 and the Court of Claims, relying on the Allotment Act, held that the United States does and will hold the land thus allotted in trust for the sole use and benefit of the Indians.[47] The court adopted a liberal

44. *Trust Relationship, supra* note 3, at 651.
45. 445 U.S. 535 (1980).
46. *Trust Relationship, supra* note 3, at 651.
47. *Mitchell I*, 445 U.S. at 542.

construction of the statute and relied on common law principles of trust to impose a fiduciary relationship on the government.

The Supreme Court reversed. In direct contradiction to the Court of Claims liberal construction, the Supreme Court required strict interpretation of the statute and held that only a very limited trust was created. The Court noted that the Allotment Act "does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands."[48] The trust was only effective to prevent alienation of land and provide immunity from state taxation. The Indians were held to have no ownership rights sufficient to treat timber as an income producing resource, therefore they had no enforceable claim.[49]

United States v. Mitchell [Mitchell II][50] interpreted the specific legislation regarding forest management that the Supreme Court held was not properly before it in *Mitchell I*. The word "trust" is not used specifically but on remand, the Court relied on the incident of government supervision and control of Indian property to liberally construe the statute reasoning that "this long continuing doctrine of government fiduciary obligation in the management and operation of the forest lands with which Interior was entrusted"[51] created a trust relationship. Moreover, the creation of the duty necessarily mandates compensation for breach. But the Court went further. The holding requires the government to obtain the greatest revenue from the timber and thus contemplates damages for the difference between the actual proceeds and the greatest revenue possible through effective management.[52] Without this construction, Indians had no remedy where the government failed to obtain fair market value or failed to make timely payments.

The Supreme Court held in *Mitchell II* that the trust duty arose from several statutes and required the Secretary to manage forests on Indian lands. The Court concluded that "a fiduciary relationship necessarily arises when the government assumes such elaborate control over forests and property belonging to Indians."[53] The holding still requires some sort of statutory trust, however broad the construction.

48. *Mitchell I*, 445 U.S. at 542.
49. *Id.*
50. 463 U.S. 206 (1983).
51. *Id.* at 225.
52. *Trust Relationship, supra* note 3, at 663.
53. *Mitchell II*, 463 U.S. at 225.

The importance of *Mitchell II* lies in its expanse. The opinion indicates an increased willingness to hold the federal government responsible. In establishing a trust claim, if there is evidence of *any* legislative authority for Interior Department supervision or control over Indian property or money *and* if the Secretary does exercise pervasive authority, a general fiduciary relationship will be found. Even broadly worded statutes will suffice if actual management has taken place. In addition, once the relationship has been established, a determination of breach of trust duties may be found in specific legislation, liberal construction of indefinite statutes or general common law principles of trust. One question remains: whether a trust relationship will be found in the absence of a statute.

Aboriginal Land Rights in Canada

For a variety of reasons, the scope of Indian rights is less firmly established in Canada than in the United States.[54] There are fewer cases, because of Canada's efforts to avoid litigation in favor of negotiated settlements, and because of the attitudes of the Canadian society as a whole. In fact, there is a broad consensus in Canada that previous governmental policies denied aboriginals their rights, giving rise to legitimate claims against the state.[55] In response to that consensus, the government of Canada is firmly committed to negotiation and settlement of land claims.

Contemporary negotiation of aboriginal and treaty rights in Canada takes place against a historical record of social trends, treaties, constitutional enactments and landmark decisions by the Canadian Supreme Court. Therefore, an analysis of the social, legislative and judicial history is imperative to understand and define the policies underlying Canada's relationship with its aboriginal community.

Social History

The Canadian Indian population is a significant proportion of the population as a whole. The aboriginal groups consist of approximately ten linguistic groups with fifty-eight dialects scattered in six recognized cultural regions.[56] Indians comprise 5%

54. Clinton, *The Proclamation of 1763: A Colonial Prelude to Two Centuries of Federal State Conflict Over the Management of Indian Affairs*, 69 B.U.L. REV. 329 (1989).

55. Sanders, *supra* note 7, at 317.

56. *Id.*

of the total population, aboriginal ancestry being reported by almost half a million Canadians in the 1981 census.[57] Of these, there are 300,000 Indians registered and thus entitled to various benefits from the Canadian government.[58]

In terms of social history, Canadians pride themselves on their tolerance. Canada has always retained civil, if not cordial relations with the United Kingdom, unlike the United States' temperamental relationship with the Crown.[59] Moreover, Canada is immensely proud of the fact that "no Indians were conquered" but rather they were peacefully brought within the ambit of the sovereign.[60] In fact, Canada maintains no cohesive theory to explain "just when and how the native peoples of Canada were won to the allegiance of the Crown and what effect this process had on their original land rights, customary laws and system of government."[61] Nevertheless, Canadians do admit that there have been some inequities.

Before World War II, Indians were overwhelmingly considered second class citizens. They were denied the vote, were prohibited from having access to liquor, and had separate and unequal schools.[62] Beginning in the postwar era, the policies and attitudes toward aboriginals began to change. This was partly a reaction to the distinguished wartime service provided by Indians. While the country had always maintained fairly good relations with the aboriginals, the public now clearly favored expanding their rights. The process, however, was slow. The phasing out of the liquor laws occurred gradually; the federal vote was ultimately obtained in 1960.[63] Finally, the early 1970s brought about a dramatic increase in litigation especially involving hunting and fishing rights.[64] In addition, the constitution, as amended in 1982, contains provisions directly addressing and recognizing aboriginal rights. Presently, the government is vigorously pursuing a course of settlement and negotiation in dealing with land claims. Canada remains deeply committed to the practice of negotiation as opposed to litigation in response to aboriginal land claim disputes.

57. *Id.*
58. *Id.*
59. Slattery, *supra* note 6, at 361.
60. Sanders, *supra* note 7, at 319.
61. *Id.* at 321.
62. *Id.*
63. *Id.* at 323.
64. *Id.* at 320.

Legislative History: The Royal Proclamation

The basis for almost all land title disputes in Canada is found in the provisions of the Royal Proclamation of 1763. The document reflects Britain's desire to curry favor with the Indians. The Proclamation declared a huge area of the country to be Indian territory and forbade purchases or settlements of that land, absent specific leave from the Crown. In effect, a legal burden existed against the Crown's ultimate title until such time as the Indians surrendered their interest.[65] No settlement of land could occur until Indian rights had been absorbed by the Crown through negotiations with the aboriginal community. Subsequent judicial interpretation holds that the Proclamation imposed a requirement of voluntary surrender assented to by a majority of the electors and accepted by the governing body of the reserve.

The terms of the Proclamation have never been repealed and it is still considered good law. Although it must be read in light of later developments, the Proclamation continues to form a principle basis for aboriginal land claims in many areas.[66]

Legislative History: Treaties

Treaties are another method of recognizing and reserving aboriginal rights. The Proclamation required voluntary cession by the Indians, and Canada needed to obtain reserve lands for settlement. The making of treaties achieved both objectives. Treaties enable the Crown to clear land of aboriginal title so that settlement or resource development could proceed. The government began signing treaties in the late 1800s and continued until the early 1920s, although amendments to existing treaties were signed up until the 1950s.[67] Initially, cash payments were made for surrender, however, the Crown later set aside reserve land and provided benefits for the surrendering Indians.[68] It is important to note that unlike the United States, where treaties have been congressionally prohibited since 1871, Canada has not declared an end to treaty making.[69]

There is little formal law regarding treaties, but they are held by the Canadian government to have the same force as domestic law. In the beginning of the 20th century, the federal government assumed unilateral legislative authority over the Indians and

65. Clinton, *supra* note 54.
66. *Id.*
67. Sanders, *supra* note 7, at 323.
68. Henderson, *supra* note 1, at 175.
69. Sanders, *supra* note 7, at 322.

thereby undercut the significance of treaties as a basis for claims.[70] Tribes vigorously opposed this and continued to assert the significance of aboriginal title claims. This led to intensive negotiations regarding land claims. In effect, treaty making has been reincarnated as land claim negotiations.

Legislative History: The Constitution

Another basis for recognizing and reserving aboriginal land rights is found in the Canadian constitution. This constitution specifically provides for aboriginal rights and reflects doctrinal ambitions first articulated in the Royal Proclamation and subsequently incorporated into the Constitution Act of 1867; the Manitoba Act of 1870; Rupert's Land and North Western Territory Order; and the Ontario and Quebec Boundaries Extension Acts of 1912.[71]

The constitution contains important provisions that specifically relate to aboriginal peoples. Section 35 recognizes and affirms existing aboriginal and treaty rights but does not substantially enhance them. It effectively prevents the nonconsensual extinguishment of title by other than a constitutional enactment or statutory scheme. Section 37 provides for a process whereby proposals for additional rights are examined by the first ministers. The constitutional committee considered and ultimately rejected a clause requiring consent by the Indians to amendments directly affecting them. Despite the absence of such a clause, there is a tradition of consultation prior to changes.[72]

The constitution makes an important distinction between existing rights and additional rights. Section 35 exhibits tremendous potential. It confirms the doctrine of aboriginal rights by providing that the rights survive acquisition by the Crown, unless incompatible with the Crown's title or modified by statute.[73] Most significantly, the constitutional provisions are a commitment to the future well being of the aboriginals and an acknowledgment of the historical role the Natives played in Canada.

Judicial History

One of the earliest cases dealing with aboriginal rights in Canada specifically relied on the Royal Proclamation. *St. Catherine's Milling & Lumber Co. v. The Queen*[74] involved the

70. Henderson, *supra* note 1, at 175.
71. Sanders, *supra* note 7, at 317.
72. *Id.*
73. Slattery, *supra* note 6, at 364.
74. 13 S.C.R. 557 (1887), 144 App. D.C. 46 (1888).

surrender of lands in Ontario under an 1873 treaty. The issue before the Privy Council was "whether certain lands admittedly situated within the boundaries of Ontario belonged to that province or to the Dominion of Canada."[75] The Court held in favor of the province of Ontario. In Canada, due to the governmental infrastructure, provinces traditionally have more power over Indians than the federal government. The crucial aspect of the decision is its discussion of land rights. The Court held that Canadian Indians have a "personal and usufructuary right, dependent on the goodwill of the government" to the use of their land.[76] The Court characterized the interest held by the Crown as the "substantial and paramount estate underlying the Indian title."[77] In the course of the opinion, the Court cited with approval the doctrine of discovery first articulated in *M'Intosh* stating that "all our instruments recognize the absolute title of the Crown, subject only to the Indian right of occupancy."[78]

More than eighty years elapsed before a case addressing aboriginal rights came before the Supreme Court of Canada. The growth of Indian activism in the post-World War II era began to force Canadian law to address the Indians' concerns.[79] In the years 1969 to 1973, Indian activism was at an all-time high.[80] During this time, litigation involving Indians increased dramatically, especially in the areas of hunting and fishing rights.[81] Canada adopted a general policy of vigorous negotiation, as opposed to litigation in respect to land claims in Northern Quebec, British Columbia and the Northern Territories.[82] Against this backdrop of favorable public opinion of Indians and Indian rights, *Calder v. Attorney General of British Columbia*[83] progressed through the Canadian courts. *Calder* is an important land title case, significant not for its outcome, but for its impact. It is largely considered to be victory in the course of aboriginal rights, albeit a political victory, not a legal one.

In *Calder*, the Nishga Indian Band brought an action seeking a declaration that the tribe's aboriginal title had never been extinguished. The action involved over one thousand square

75. *Id.*, 144 App. D.C. at 51-52.
76. *Id.*, 144 App. D.C. at 54.
77. *Id.*, 144 App. D.C. at 55.
78. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 557 (1823).
79. Erickson, *supra* note 4, at 112.
80. *Id.* at 130.
81. Henderson, *supra* note 1, at 180.
82. Slattery, *supra* note 6, at 368.
83. 34 D.L.R. 3d. 145 (Can. 1973).

miles that had been occupied by the Nishgas since time immemorial. The government did not claim that the tribe had surrendered their interest by treaty or otherwise. Rather, the government based its claim on implied extinguishment by virtue of nine proclamations by the Royal Governor and four ordinances passed by the governor in council.

The Indians lost at trial and on appeal, but a deeply divided Supreme Court was unable to decide if aboriginal title had been extinguished. Three Supreme Court judges held that the title was extinguished,[84] three held that there had been no extinguishment,[85] and three held that dismissal was proper for lack of fiat to sue the government.[86] Despite this split, the case was a major breakthrough in terms of recognition of aboriginal land title rights because all of the opinions agreed that land title rights were preexisting rights, not dependent on the Royal Proclamation.[87]

The opinion which held that aboriginal title had been extinguished relied on *St. Catherine's* to determine that the right of the sovereign is absolute, requiring no compensation or explanation. In effect, the Court reasoned that extinguishment was a nonjusticiable act by the sovereign.[88]

The dissent in *Calder* recognized that title was extinguishable at the discretion of the sovereign but maintained that a rebuttable presumption was raised in favor of continued aboriginal title once established. Therefore, once the Nishga came under British sovereignty, the title could only be extinguished by surrender to the Crown.[89]

Calder expands the concept of aboriginal title by recognition of the preexistence of the right. In this, the case goes beyond *St. Catherine's* by acknowledging that the Royal Proclamation is not the sole source of aboriginal title. Therefore, a fiduciary relationship exists not by legislative affirmance but rather as a result of continued occupation and possession. The Court cited the decisions in *Johnson* and *Worcester* to attempt to define the boundaries of the fiduciary relationship.[90] While considered a victory due to the acknowledgment of aboriginal rights, *Calder's*

84. *Id.* at 148-68.
85. *Id.* at 168-223.
86. *Id.* at 223-26.
87. Erickson, *supra* note 4, at 130.
88. *Calder*, 34 D.L.R. 3d at 150-52.
89. Erickson, *supra* note 4, at 133.
90. *Calder*, 34 D.L.R. 3d at 151.

split decision and the ultimate settlement of the Nishga claim led to a confusion of standards and uncertain results.

The most recent and perhaps most significant case in the area of aboriginal rights is *Guerin v. The Queen*.[91] *Guerin* is a breach of trust suit arising out of the leasing of reservation lands to a third party. *Guerin* is considered to be the most progressive of the aboriginal cases. It has had an enormous impact in establishing and expanding aboriginal rights.

The facts are: in 1955, officials of the Indian Affairs Branch proposed a lease of approximately 160 acres of the Musqueam Indian Reserve in Vancouver. The Musqueam Band consented to an appraisal and officials began negotiations with the Shaughnessy Heights Golf Club of Vancouver. The actual lease proposal was not submitted to the band, although its general terms were outlined. The appraiser was unaware of the proposed terms of the lease. Based on the information provided, the Band agreed to lease the land for a certain annual rent. The Band maintained and the Court agreed that the rent applied to an initial term of fifteen years with the lease being renewable for six ten-year terms thereafter, the rent being negotiable for each renewable term. In fact, the lease provided for four fifteen-year renewal terms subject to a 15% maximum increase during the first renewal term. This ambiguity resulted in substantial disparity in terms of economic returns on the property.

The case raised a question of first impression in Canada: whether the Musqueam Indians could recover damages from the government as a result of a breach of trust agreement. The Band demonstrated that the Band, the appraiser, and the golf club had different information; that given the true information, the Band would not have agreed to surrender; that the Indians' repeated requests for a copy of the lease were ignored for more than a decade; and that the actual lease did not conform to the terms discussed with the band.

The government argued that the Indians had no legal rights whatsoever, that any trust relationship was of a political, not a legal nature, and therefore judicially unenforceable. In response, the Court held that the Band's property interest was a preexisting right, not created by the Royal Proclamation or by any other executive order or legislative provision. Therefore, Indian rights of occupation and possession were undisturbed by European colonization or the colonist's claims of sovereignty. Hence, their claim was not the subject matter of a political trust since the

91. 13 D.L.R. 4th 321 (Can. 1984).

interest was limited by the nature of Indian title. The Indians had an independent legal interest; therefore, the Crown's duty was not merely a public law duty and therefore unenforceable. Nor was it a private law duty in the strict sense. The right was not beneficial, nor was it a "personal, usufructuary right." Instead, the Court determined that, based on the fact of inalienability, the relationship was *sui generis*; the interest of the Indians was such that it gave rise "upon surrender to a *distinctive fiduciary obligation* on the part of the Crown to deal with the land for the benefit of the surrendering Indians."[92]

The Court determined that in obtaining, without consultation, a much less valuable lease than that promised, the government had breached its duty of trust through fraud and concealment.[93] Damages were assessed by analogy to trust law and $10 million dollars was awarded to the Band.[94] The Band also alleged failure on the part of the Crown to exercise the requisite care and management as trustee, but the Court did not specifically address this issue. Therefore, the question is left open whether, absent fraud, the result would have been the same.

The significance of the holding in *Guerin* cannot be overstated. Principally, the case is extraordinary due to the fact that it imposed fiduciary obligations in favor of Indians. In addition, *Guerin* is the first clear decision in Canadian law that Indian rights arise from preexisting indigenous legal order and not from a common law doctrine or an affirming action by the legislature.

Following *Calder*, the holding in *Guerin* significantly expanded the concept that Indians have legal redress in the courts of Canada for their grievances, including land claims. While the government has vigorously pursued a course in negotiation of land claims, it was a very important victory for the Indians to realize that the courts were also open to them. The holding was an open acknowledgement of access to legal redress.

Comparison of United States and Canadian Law

Significantly, the *Guerin* Court never cited *Mitchell*. While at first glance the decisions appear to be incongruous, in fact they are not wholly divergent. *Mitchell* effectively holds that given a statute, and actual management by the Secretary of the Interior, liberal construction will be employed to establish a fiduciary relationship. *Guerin* is more expansive, imposing the obligations

92. *Id.* at 339 (emphasis added).
93. *Id.* at 344.
94. *Id.* at 345.

of a trust relationship on the government based on historical equity. The obligation arises out of the preexistence of aboriginal title. However, both decisions reflect an increased willingness on the part of the judiciary to hold the government responsible to the aboriginal community. In both the United States and Canada, there is evidence of increased facility in establishing the existence of a trust relationship and an expansion of the scope of the obligations of the government.

Ultimately, the desirability of recognizing a cause of action for breach of trust relates to whether legal remedies provide adequate protection for Indian rights. That is, awarding damages may frustrate the purpose of the trust—to maintain a separate Indian culture. Specific performance of a federal trust relies upon a connection between a resource base and a goal of maintaining separate and identifiable cultures. Nevertheless, the extent to which the fiduciary relationship is enforceable against the government has fueled controversy.

Conclusion

In any land claim case, the odds favor the government's interest. The disparity in resources and information tends to favor the state. In contrast, the odds are against aboriginal peoples who maintain such strong and spiritual ties to their land but are, in comparison, politically powerless. The community is inherently unique, maintaining a separate culture and exercising inherent governmental powers yet having none of the rights accorded states. Therefore, their interests necessitate sensitivity and sincerity. Canada is aware of the needs of the aboriginal community and has responded well. Legislatively, the progress in defining and maintaining the parameters of the fiduciary relationship is admirable. Judicially, *Guerin* significantly departs from precedent and perhaps indicates a new era of judicial activism in land claims.

Much of substantive law is still being formed in Canada. The volume of cases is rising geometrically. As more and more diverse claims are asserted and a growing sensitivity to aboriginal rights is observed, the parameters of the fiduciary relationship are being confirmed and expanded. The principle that native peoples have the right to use and occupy the lands they have occupied since time immemorial is undisputed. The protection of these rights is the obligation of the government by whose providence they exist. Increasingly, the judiciary is willing to acknowledge the existence of a trust relationship and impose

higher standards of obligations on the government in discharge of its duties. Aboriginals are no longer viewed as economically disadvantaged or victims of discrimination. Rather, they are looked upon as a significant percentage of the population who have legitimate claims against the state. The judiciary is obligated to enforce these rights by imposition of trust obligations on the government.